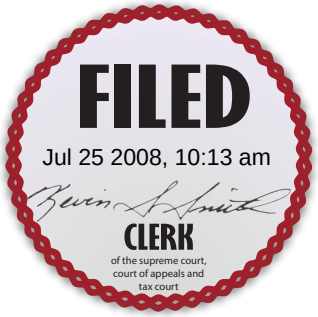

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IN THE
COURT OF APPEALS OF INDIANA

ALLISON BLACK,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 79A05-0711-CV-656
	)	
JOHN BASHAM and CONNIE BASHAM,	)	
d/b/a BASHAM RENTALS,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald Johnson, Judge
Cause No. 79D01-0608-CT-145

July 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Allison Black appeals the trial court's grant of summary judgment in favor of John and Connie Basham, d/b/a Basham Rentals (the "Bashams"), denying her premises liability claim. Black raises two issues on appeal, which deal with whether there were genuine issues of material fact rendering summary judgment inappropriate. We restate these issues as:

I. Whether the Bashams owed Black a duty of reasonable care to protect her from the danger posed by the fifteen-inch drop from the apartment complex rear walkway to the alleyway below.

II. Whether the drop from the apartment complex sidewalk was the proximate cause of Black's fall.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

The evidence designated for summary judgment was as follows: On October 15, 2004, Black came to Purdue University to stay overnight with her friend, Erika Conrad, and attend a football game the following day. At the time, Conrad lived at the Fowler Ridge Apartments. This apartment building is owned and operated by the Bashams.

The Fowler Ridge Apartments have an alleyway that borders on the west side of the building. The back of the building faces the parking lot to the south, and the front faces West Fowler Avenue to the north. There are entrances to the individual apartments at the front and rear of the building. There is a four- or five-foot-wide sidewalk that runs along the west side of the building from the rear parking lot area to the front. On the west-edge of the sidewalk the Bashams placed landscaping blocks flush with the apartment sidewalk to separate the sidewalk from the alleyway below. The landscaping blocks have a pattern and color distinct from the alleyway and sidewalk. Near the rear of the building, the change in elevation from

the ledge of landscaping blocks to the adjacent alleyway is approximately fourteen to fifteen and a half inches and gradually increases as one heads north.[1]

The accident in this case took place in the afternoon at the rear southwest corner of the apartment building. Black was in the parking lot prior to leaving for the game when she realized Conrad had started to walk toward the stadium with another friend. Conrad had walked down the alleyway and was about to cross West Fowler Avenue. Not wanting to be left behind, Black jogged toward the alleyway in an attempt to catch up with Conrad or get within earshot of her. Black did not notice the degree of the drop from the ledge of landscaping blocks to the alleyway, and she fell into the alleyway onto the right side of her face, causing substantial injuries to her face and mouth.

On August 17, 2006, Black filed suit against the Bashams alleging that, by building the ledge of landscaping blocks with no warning and no railing, they had created a condition that they knew or should have known presented an unsafe condition or risk of injury to invitees. Black further alleged the Bashams were negligent in one or more of the following ways: 1) failing to exercise reasonable care in maintaining the premises; 2) creating a hazard by building the fourteen-inch to fifteen-and-a-half-inch drop; 3) failing to adequately warn Black of the dangerous condition; 4) failing to provide adequate railing on the premises; and 5) failing to exercise reasonable care in maintaining the sidewalk where Black fell.

[1] The parties disagree about the height of the wall where Black fell, but, for the purpose of summary judgment, the Bashams accept and use Black's measurements. *See Appellant's App.* at 13.

The Bashams sought summary judgment arguing, among other things, that there was no breach of duty because the drop from the ledge was obvious. The Bashams argued, "the evidence does not support a reasonable inference that the Bashams should have: a) expected Ms. Black to fail to discover, realize, or avoid the allegedly dangerous [fifteen] inch drop from the ledge; or b) anticipated the harm despite Ms. Black's knowledge and awareness." *Appellant's App.* at 15. At the summary judgment hearing on September 6, 2007, Black acknowledged that the sole basis of her complaint was that the degree of the change in elevation from the ledge of landscaping blocks to the alleyway was unsafe and difficult to gauge.[2] Black claimed the Bashams were, therefore, negligent in failing to warn her of or protect her from this alleged danger. The trial court disagreed and granted the Bashams' motion for summary judgment.[3] Black now appeals.

DISCUSSION AND DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rhoades v. Heritage Invs., LLC*, 839 N.E.2d 788, 791 (Ind. Ct. App. 2006), *trans. denied*. When reviewing the trial court's decision on a summary judgment motion, we stand in the shoes of the trial court. *Id*. A defendant in a negligence case seeking summary judgment must demonstrate that the designated facts do not support a material element of the plaintiff's claim or that an

[2] Black has made no allegation that the ledge was in disrepair or that a foreign substance was on or around the ledge. Further, Black acknowledged that she was not aware of any code violations regarding the change in elevation.

[3] In its order, the court found, as a matter of law, no breach of duty and "no evidence that a design flaw, dangerous condition or other defect in the ledge caused the plaintiff to fall." *Id*. at 5.

affirmative defense precludes liability. *Coffman v. PSI Energy*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004), *trans. denied* (2005).

"We note that summary judgment is generally inappropriate in negligence cases because issues of contributory negligence, causation, and reasonable care are more appropriately left for the trier of fact." *Id.* At the same time, we recognize that determining whether the facts support a viable negligence claim is a question of law. *Id.*

To recover under a theory of premises liability sounding in negligence, a plaintiff must establish the following elements: "'(1) defendant's duty to conform his conduct to a standard of care arising from his relationship with the plaintiff; (2) a failure of the defendant to conform his conduct to the standard of care; and (3) an injury to the plaintiff proximately caused by the breach.'" *Horine v. Homes by Dave Thompson*, 834 N.E.2d 680, 683 (Ind. Ct. App. 2005) (quoting *Estate of Heck ex. rel. v. Stoffer*, 786 N.E.2d 265, 268 (Ind. 2003)).

Generally, a landowner has a common-law duty to keep his property in a reasonably safe condition for business invitees, and that obligation exists where injury is reasonably foreseeable in light of the hazardous nature of the instrumentalities on the owner's premises. *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212, 1218 (Ind. Ct. App. 1983). Here, the parties agree that the incident occurred in a common area and that Black was a social guest of a tenant, and as such, the Bashams owed her the same duty to maintain the property in a reasonably safe condition as the Bashams owed the tenant. *See Flott v. Cate*, 528 N.E.2d 847, 848 (Ind. Ct. App. 1988). A landlord owes the same duty to the tenant and the tenant's social guests in common areas as the landlord would owe a business invitee. *Id.* 848-49. Indiana has adopted the Restatement (Second) of Torts' formulation of landowners' liability

to invitees on the premises. *Douglass v. Irvin*, 549 N.E.2d 368. Section 343 of the Restatement (Second) of Torts sets forth the scope of the duty owed to an invitee such as Black:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Further, section 343A(1), which is meant to be read in conjunction with section 343, provides, "a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

The issue here is whether the drop between the apartment complex rear walkway and the alleyway was a hazard upon which, in the absence of reasonable care and the presence of proximate cause, premises liability provides relief.

I. Reasonable Care

First, we must determine whether Black put forth sufficient evidence to create a genuine issue of material fact that the drop from the apartment complex sidewalk to the alleyway was a dangerous condition or a condition posing an unreasonable risk and that the condition was not obvious to Black or that if it was obvious the Bashams should have anticipated the harm despite its obviousness.

The determination whether a breach of duty occurred is a factual question that requires

an evaluation of the landowner's conduct with respect to the requisite standard of care, and the comparative knowledge of the landowner and the invitee regarding known or obvious dangers is relevant when making this factual assessment. *Smith v. Baxter*, 796 N.E.2d 242, 244 (Ind. 2003) (quoting *Douglass v. Irwin*, 549 N.E.2d 368, 370 (Ind. 1990)). The evidence to support a conclusion that the landlord had notice of the dangerous condition does not have to be conclusive, but only established by a reasonable inference. *Id.*

> "For the purpose of analysis of breach of duty, a landowner's knowledge is evaluated by an objective standard. This is in contrast to the determination of incurred risk, wherein the invitee's mental state of venturousness (knowledge, appreciation, and voluntary acceptance of the risk) demands a subjective analysis of actual knowledge."

Id. (citing *Douglass*, 549 N.E.2d at 368).

Black argues that summary judgment was inappropriate because there were sufficient facts for the jury to conclude that the Bashams failed to exercise reasonable care in inspecting and protecting Black from the fifteen-inch drop from the apartment complex sidewalk to the alleyway and that she was not aware nor should she have been aware of the dangerous condition. The Bashams claim, however, that the facts did not demonstrate that the Bashams could have discovered, through the use of reasonable care, that the drop posed an unreasonable risk of harm to their tenants, or that their tenants would not realize the danger.

This court has held that the issue of notice of a danger is a question of fact for the trier of fact. *St. Mary's Ctr. of Evansville, Inc. v. Loomis*, 783 N.E.2d 274, 279 (Ind. Ct. App. 2002) (citing *Schloot v. Guinevere Real Estate Corp.*, 697 N.E.2d 1273, 1276 (Ind. Ct. App. 1998)). For purposes of analyzing breach of duty, however, knowledge is evaluated by an objective standard. *Douglass*, 549 N.E.2d 368. Thus, we look to whether, as a matter of law,

the Bashams could reasonably expect that Black would discover, realize, and avoid the alleged danger.

Here, the designated evidence raised a genuine issue of material fact as to whether: the Bashams owed a duty of reasonable care to Black; the duty of reasonable care required the Bashams to maintain a safe premises; a safe premises included protection or at least a warning against an unreasonably dangerous condition; the fifteen-inch drop between the apartment's rear walkway and the alleyway was an unreasonably dangerous condition; the Bashams were aware of the condition; Black was not aware of the condition; and the condition was not obvious to Black. In support, Black testified at her deposition that she was not aware of the degree of the drop from the ledge where she fell. *Appellant's App.* at 102. John Basham testified he was aware of the condition because he was the person who designed the block ledge. *Id.* at 150. He also testified that he did not put a sign out to warn tenants because, "they're not going to read the sign. They're drunk, they're partying. There's nothing you can do. Unless you want me to put a chainlink fence all the way around the building, ..." *Id.* at 165.[4]

The dissent suggests that, because an objective standard is used to determine whether a condition was obvious, the trial court, and this court, under our *de novo* standard of review,

[4] The International Building Code ("IBC") defines the maximum riser height between two stair treads or a step to be seven and three quarter inches. The ledge between the alleyway and the apartment walkway, which was fifteen inches off the ground, separated two areas that were common to foot traffic. The IBC was not before the trial court and is, therefore, not available for us on appeal.

can determine that Black should have discovered the danger. We disagree and find that reasonable minds can differ as to whether Black should have discovered that the ledge posed an unreasonable risk and whether the drop from the ledge was obvious.[5] "[F]acts showing only that a landowner knows of a condition involving a risk of harm to an invitee, but could reasonably expect the invitee to discover, realize, and avoid such risk, *may* be insufficient to prove breach of that duty." *Douglass*, 549 N.E.2d at 370. However, the same facts may be sufficient to prove liability; we therefore leave that for the trier of fact to determine. We find there are sufficient facts for a trier of fact to find that the fifteen-inch drop from the apartment complex sidewalk to the alleyway below posed a danger that was unreasonable and foreseeable by the Bashams, yet not obvious to Black.

II. Proximate Cause

Lastly, Black contends that there were sufficient facts to raise a genuine issue that the drop from the apartment complex sidewalk to the alley caused her to fall.

"'Whether an act is the proximate cause of a plaintiff's injury depends upon whether the injury was a natural and probable consequence of the act at issue, which, in light of the attending circumstances, could have been reasonably foreseen or anticipated.'" *Mayfield v. Levy Co.*, 833 N.E.2d 501, 506 (Ind. Ct. App. 2005) (quoting *Lane v. St. Joseph's Reg'l Med. Ctr.*, 817 N.E.2d 266, 273 (Ind. Ct. App. 2004)). Causation may not be inferred merely through the existence of an allegedly dangerous condition. *Midwest Commerce Banking v.*

[5] The dissent suggest that the landscaping blocks between the sidewalk and the alleyway provided such a clear distinction that allowed the trial court to rule as a matter of law that the drop was obvious. We note that the blocks were perfectly flush with the sidewalk above and only a direct view of their color and design would distinguish them from the sidewalk. Therefore, we leave it to the trier of fact to determine whether the drop was obvious.

Livings, 608 N.E.2d 1010, 1012-13 (Ind. Ct. App. 1993). The plaintiff must identify that the defendant owed the plaintiff a duty, which was breached, and the breach was the *cause* of a plaintiff's injury. *Hassan v. Begley*, 836 N.E.2d 303, 307-08 (Ind. Ct. App. 2005); *see also Horine*, 834 N.E.2d at 683.

Black's deposition testimony distinctly identified the drop from the apartment complex ledge sidewalk to the alley as the place where she fell and that, as she approached the ledge, she did not notice the degree of the change in elevation. *Appellant's App.* at 99, 102. The remainder of her testimony goes to the weight of the evidence and her credibility as a witness, issues this court may not decide and that are inappropriate for summary judgment. *Beta Steel v. Rust*, 830 N.E.2d 62, 68 (Ind. Ct. App. 2005). Instead, we view designated evidence in a light most favorable to the non-moving party. *Id.* Black designated sufficient evidence to create a genuine issue of material fact as to whether her fall was caused by the drop from the apartment complex sidewalk to the alley below.

Reversed and remanded.

BAILEY, J., concurs.

FRIEDLANDER, J., dissents with separate opinion.

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COURT OF APPEALS OF INDIANA

ALLISON BLACK,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 79A05-0711-CV-656
	)	
JOHN BASHAM and CONNIE BASHAM, d/b/a BASHAM RENTALS,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald Johnson, Judge
Cause No. 79D01-0608-CT-145

FRIEDLANDER, Judge, dissenting.

I would affirm summary judgment in favor of the Bashams, finding no breach of duty as a matter of law. Therefore, I respectfully dissent.

Initially, it is important to observe that the fifteen-inch drop is not from the apartment complex sidewalk to the alleyway below, as suggested throughout the Majority's analysis of the breach of duty issue. Rather, the sidewalk in question ran along the west side of the building from the rear parking lot area to the front of the building, and landscaping bricks were used to separate this walkway from the alleyway. The sidewalk did not lead to the alleyway and was not intended as a point of ingress and egress to and from the alleyway. Thus, the fifteen-inch drop was from the landscaping bricks to the alleyway below, not from the sidewalk to the alleyway. I believe this is a critical distinction in analyzing breach of

duty in the instant case.

As recognized by the Majority, Black does not contend that the ledge was dangerous due to disrepair or some other defect. Rather, her sole complaint is with the fifteen-inch drop from the ledge of landscaping bricks to the alleyway below. She argues the evidence shows she did not have knowledge of the alleged dangerous condition (that is, the degree of elevation change) prior to her fall. For purposes of analyzing breach of duty, however, knowledge is evaluated by an objective standard. *Douglass v. Irvin*, 549 N.E.2d 368 (Ind. 1990).

Even assuming the drop constituted a risk to invitees, I agree with the trial court that the condition of the ledge was easily observable and obvious as a matter of law. As set forth above, the sidewalk did not lead to the alleyway. Rather, landscaping blocks clearly separated the sidewalk from the alleyway and provided a visual cue as to the change in elevation. Black may not have been personally aware of the extent of the drop as she left the designated pathway and chased after her friends. The evidence, however, does not support a contention that it was unreasonable of the Bashams to expect an invitee traversing the area in broad daylight to see the ledge prior to stepping *away from* the sidewalk and into the alleyway.

Viewing the facts and inferences most favorable to Black, I find them inadequate to present a triable issue of fact as to whether the Bashams breached their duty of reasonable care. The evidence simply does not support a reasonable inference that the Bashams should have: 1) expected Black to fail to discover, realize, or avoid the alleged dangerous fifteen-inch ledge; or 2) anticipated the harm despite Black's knowledge and awareness. Therefore,

I agree with the trial court's grant of summary judgment based upon an absence of a genuine factual issue as to breach of duty.